Case No. 82288-3

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF FEDERAL WAY, *Respondent*,

v.

DAVID KOENIG,
Appellant.

STATEMENT OF GROUNDS FOR DIRECT REVIEW BY SUPREME COURT

WILLIAM JOHN CRITTENDEN
Attorney for Appellant

William John Crittenden
Attorney at Law
927 N. Northlake Way, Ste 301
Seattle, Washington 98103
(206) 361-5972
wjcrittenden@comcast.net

Appellant David Koenig seeks direct review of the *Order Declaring Public Records Act Does Not Apply to Federal Way Municipal Court* entered on or about September 24, 2008 in *City of Federal Way v. Koenig*, King Co. No. 08-2-21328-5 KNT.

I. NATURE OF CASE AND DECISION

This case presents the significant question of whether, and to what extent, the Public Records Act, Chapter 42.56 RCW ("PRA"), applies to state and local courts. This Court has addressed this issue once, more than twenty yeas ago in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). In that case, the Court held that the PRA[1] did not apply to court case files. *Nast*, 107 Wn.2d at 307.

In two recent cases the Court of Appeals has expanded upon *Nast*, holding that the PRA was not applicable to a judge's sentencing notes or to correspondence from Spokane County judges to the Washington State Bar Association. *Beuhler v. Small*, 115 Wn. App. 914, 918, 64 P.3d 78 (2003) (sentencing notes); *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 617, 150 P.3d 158 (2007), *review denied*, 162 Wn.2d 1004 (2007) (correspondence). Agencies, like the respondent City of Federal Way ("City"), have gone much further, relying on *Nast* and its progeny to

[1] At the time of *Nast* the PRA was codified as part of the Public Disclosure Act, Chapter 42.17 RCW. *See* RCW 42.56.001.

withhold a broad and poorly defined class of "court records." Many of these records have little, if anything, to do with the judiciary or the judicial functions of courts. To make matters worse, agencies refuse to identify withheld records, or admit that such records exist, based upon the argument that the entire PRA, with all of its procedural safeguards and provisions for judicial review, is inapplicable to "courts" or "court records."

In this case, the City withheld (i) a judge's correspondence relating to a controversy involving public officials, (ii) records relating to the appointment of *pro tem* judges, and (iii) records of work-related exemptions from jury duty. The City argued that all of these records were "court records" that are not subject to the PRA under *Nast*.[2] In response, Koenig argued that the analysis of the PRA in *Nast* is erroneous and, in any event, should not be extended to other types of records.[3] Koenig further argued, based on decisions of this Court since *Nast*, that the application of the PRA to the administrative functions, records, or personnel of the municipal court should be analyzed under the doctrine of

---

[2] *City of Federal Way's Motion Regarding Non-Disclosure of Court Records* ("*City's Motion*") at 3-4.

[3] *Response and Cross-Motion for Partial Summary Judgment* ("*Koenig's Cross-Motion*") at 6-10.

separation of powers.[4] In reply, the City argued that *Nast* was binding on the trial court whether or not the analysis in that case was actually correct.[5]

After hearing the parties' arguments at the motion hearing, the trial court observed that the issues in this case need to be decided by this Court:

> Regardless of how I rule, it seems to me that this is a case that in view of related issues that have come about over the course of the last several years that the State Supreme Court ought to take a look at, regardless.
>
> I haven't made up my mind how I am going to rule, but if I rule against you, I would really strongly encourage you to take that up...
>
> And what I am also encouraging you to do is ... bypass the court of appeals and go right to the State Supreme Court because you are just going to be wasting your time at the court of appeals. Not that they won't give you a reasoned, good decision, but ultimately the State Supreme Court has to resolve this issue regardless of how I rule.
>
> So, I would be willing to assist you in seeing that the matter is transferred directly to the State Supreme Court.[6]

After taking the matter under advisement, the trial court concluded, in its written order, that it was constrained by the "existing case authority"

---

[4] *Koenig's Cross Motion* at 10-16.

[5] *City of Federal Way's Response to Counterclaims and Reply* ("*City's Response*") at 3.

[6] *Transcript* (9/19/08) at 32-33, attached hereto as Appendix A. The same transcript will be transmitted to the Court pursuant to RAP 9.2.

to hold that the entire Federal Way Municipal Court is not subject to the PRA.[7] The trial court further held that the City was not obligated to redact or identify any of the records that it had withheld. *Id.* Following the trial court's advice, Koenig appeals directly to this Court.

The trial court correctly observed that the time has come for this Court to re-visit *Nast*. Agencies are relying upon *Nast* to exclude a large slice of Washington government from the openness promised by the PRA. *See* RCW 42.56.030 ("The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."); *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995) ("The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.")

As explained in Section III (below), there are significant flaws in *Nast*. In addition, *Nast*'s analysis is untenable in light of a significant amendment to the PRA after *Nast*. None of the original *Nast* justices are still on the bench today, and there is real doubt as to whether this Court

[7] *Order Regarding Production of Court Records* (9/24/08) at 2, attached hereto as Appendix B.

would adhere to the erroneous analysis in that 22-year-old case. This Court might well reach the same result as *Nast* with respect only to case files and certain types of judicial records. But the Court must consider a significant amendment to the PRA in 1987 (after *Nast*), and in any case this Court is unlikely merely to repeat the erroneous, inadequate, and result-driven analysis of the PRA in *Nast*. The Court is not likely to give agencies unfettered and unreviewable discretion to withhold whatever public records agencies choose to characterize as "court records." Nor is the Court likely to permit agencies to simply ignore requests for "court records" or to refuse to admit that such records even exist.

II. ISSUES PRESENTED FOR REVIEW

A. Whether the erroneous analysis of the PRA in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), should be extended to other types of records.

B. Whether the application of the PRA to the administrative functions, records, or personnel of courts may be limited by the doctrine of separation of powers.

C. Whether the City must identify all records that it has withheld and disclose the particular person(s) in possession of the records that the City has withheld.

III. GROUNDS FOR DIRECT REVIEW

The Court should grant direct review pursuant to RAP 4.2(a)(4) because this case involves fundamental issues of broad public import that require prompt and ultimate determination by this Court. Specifically, this Court must decide whether *Nast* is correct and may be expanded to place all "court records" beyond the reach of the PRA. This Court must decide whether the analysis of the PRA in *Nast* should be rejected in favor of an analysis under the doctrine of separation of powers.

A. The validity and scope of *Nast* require a prompt and ultimate determination by this Court.

In *Nast*, the King County Superior Court clerk adopted a new policy that required 1-day notice to access court case files. An attorney, Nast, sued under the PRA arguing that the 1-day policy violated the PRA, the common law right of access to court files, and the state and federal constitutions. The superior court found that the new policy violated both the PRA and the common law because the files were not promptly available. *Nast*, 107 Wn.2d at 301. On direct review, the Supreme Court ruled that the common law provides a right of access to court files but that the PRA was not applicable to case files. *Nast*, 107 Wn.2d at 304. This conclusion was based on three points:

> We hold the PDA does not apply to court case files [1] because the common law provides access to court case

> files, [2] because the [PRA] does not specifically include courts or court case files within its definitions and [3] because to interpret the [PRA] to include court case files undoes all the developed law protecting privacy and governmental interests.

Nast, 107 Wn.2d at 307.[8]

As Koenig's cross-motion explained, the analyses supporting these three points is seriously flawed and based on erroneous assumptions. First, the *Nast* court's observation that the common law provides for access to court files is largely irrelevant. Second, the Court's determination that the PRA did not specifically include courts or case files was based on a narrow interpretation of the terms "agency" and "public record." Third, the *Nast* court erroneously assumed that the application of the PRA to court case files would eliminate various statutory restrictions on access to court files, including provisions that protect various privacy interests.[9] In the trial court the City did not defend the first two points of *Nast's* analysis.[10]

---

[8] In two prior cases the Supreme Court had declined to determine whether the "judicial branch" was an agency for purposes of the PRA. *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981); *see Cohen v. Everett City Council*, 85 Wn.2d 385, 390, 535 P.2d 801 (1975).

[9] *Koenig's Cross Motion* at 7-9.

[10] *Reply on Cross-Motion for Partial Summary Judgment* ("*Koenig's Reply*") at 3.

Koenig also pointed out that the 1987 legislature addressed the *Nast* court's third point, by expressly adding the "other statute" exemption to the PRA. RCW 42.56.070(1); Laws of 1987, ch. 403, § 3. After the 1987 legislation, the application of the PRA to court case files would not eliminate existing statutory restrictions on access to such files.[11] The City does not deny that this legislation obviated *Nast's* concern for the effect of the PRA on other statues outside the PRA. Instead, in the trial court, the City quibbled over the irrelevant issue of whether the legislature had "overruled" *Nast* as opposed to merely amending the PRA.[12]

Despite the obvious problems with the analysis of the PRA in *Nast* and the subsequent amendment to the PRA, the Court of Appeals has followed and expanded upon *Nast* in *Beuhler v. Small*, *supra*, and *Spokane & Eastern Lawyer*, *supra*. In this case, the trial court felt that it was constrained by *Nast* and its progeny to hold that all of the records withheld by the City were beyond the reach of the PRA.

Although *Nast's* actual holding is narrow, the effect of *Nast* on open government has been substantial. The lower courts have interpreted *Nast* to hold that courts are not agencies under the PRA, and that court

---

[11] *Koenig's Reply* at 3.

[12] *City's Response* at 3-5.

records are not subject to the PRA. *Spokane & Eastern Lawyer*, 136 Wn. App. at 621-22. The limits of this interpretation are not clear. An enormous variety of public records are potentially beyond the reach of the PRA until this Court rejects or at least clarifies the unfortunate analysis of the PRA in *Nast*. Koenig is aware of at least two other appeals currently pending that involve the application of the PRA to courts or court records. *Morgan v. City of Federal Way*, Supreme Court No. 81556-9 (motion to transfer pending); *Yakima County v. Yakima County Herald Republic*, Supreme Court No. 82229-8 (appeal pending).

Nast held that a particular type of public records — court case files — were not governed by the PRA, but this holding did not place such records beyond the reach of the public. Indeed, *Nast* was based, in part, on a determination that the public already had a common law right to access such files. *Nast*, 107 Wn.2d at 303. However, the expansion of *Nast* by the lower courts and agencies, such as the City in this case, has created a third category of public records to which there is no public right of access. If the PRA does not apply to so-called "court records" and there is no common law right to access such records, then all of the records, including administrative records that have nothing to do with the judicial functions of courts, are removed from Washington's system of open government.

Koenig seeks direct review in this Court because the Court of Appeals is limited in its ability to adjudicate a direct challenge to the continuing validity of *Nast*. Koenig maintains that the holding of *Nast* is limited to court case files and that the broader language of *Nast* may be rejected as dicta. But the City disagrees, maintaining that *Nast* clearly holds that courts and court records are not subject to the PRA. A debate over whether, and to what extent, *Nast* is actually binding on the lower courts is largely beside the point. Only this Court can directly overrule *Nast* and analyze the PRA unencumbered by the language in *Nast*.

As the trial court observed, "ultimately, the State Supreme Court has to resolve this issue."[13] This Court should grant direct review pursuant to RAP 4.2(a)(4).

B. This Court should address the fundamental question of how the separation of powers may apply to the Public Records Act.

The erroneous analysis of the PRA in *Nast* stemmed from the *Nast* court's inexplicable failure to consider the relevant legal doctrine: separation of powers. Rather than perpetuate and extend the errors in *Nast*, *Beuhler*, and *Spokane and Eastern Lawyer*, this Court should recognize that the application of the PRA to the administrative functions, records, or personnel of the municipal court may be limited by the

[13] *Transcript* (9/19/08) at 33; Appendix A at 33.

doctrine of separation of powers. Under a correct analysis of the separation of powers, the Court may conclude that *Nast*, *Beuhler*, and *Spokane and Eastern Lawyer* reached the right result for the wrong reasons.

In cases decided after *Nast*, the Court has recognized that the branches of government are not "hermetically sealed off from one another." *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Instead, the "branches must remain partially intertwined ... to maintain an effective system of checks and balances, as well as an effective government." *Id.* This "intertwining" of branches is constitutionally permitted so long as "the fundamental functions of each branch remain inviolate." *Id.* To constitute a violation, the invasion of one branch's fundamental and inherent functions must "directly and unavoidably conflict" with those of another branch or "clearly contravene" the separation of powers. *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 906, 890 P.2d 1047 (1995) (holding that a statute which "directly and unavoidably" conflicted with a pre-existing court rule constituted impermissible legislative encroachment on a fundamental judicial function); *Fritz v. Gorton*, 83 Wn.2d 275, 287, 517 P.2d 911 (1974) (noting that the judiciary must not substitute its judgment for that of the

legislature or of the people through the initiative process "unless the errors in judgment clearly contravene state or federal constitutional provisions.")

The authority to regulate court-related functions belongs exclusively to the judiciary. Nonetheless, this Court has "recognized that it is sometimes possible to have an overlap of responsibility in governing the administrative aspects of court-related functions." *Washington State Bar Ass'n*, 125 Wn.2d at 908. Examples of legislative enactments which apply to the judicial branch without invading its inherent functions include "the Industrial Insurance Act (RCW Title 51), the Employment Security Act (RCW Title 50), Washington Minimum Wage Act (RCW 49.46), and the state's law against discrimination (RCW 49.60)." *Spokane County v. State*, 136 Wn.2d 663, 671, 966 P.2d 314 (1998).

Under these cases, there is no *per se* prohibition against the application of the PRA to the administrative functions, records, or personnel of courts. Applying the PRA's requirements to "the administrative aspect of court-related functions" does not "clearly contravene" the doctrine of separation of powers, nor does it "directly and unavoidably conflict" with "the fundamental functions" of the judiciary. *Spokane County*, 136 Wn.2d at 672. Conversely, application of the PRA to a judge's sentencing notes (*Beuhler*) or correspondence with the bar association (*Spokane and Eastern Lawyer*) would arguably interfere with

the fundamental or inherent functions of both the judiciary and the bar association.[14]

This Court should address the fundamental question of how the separation of powers may apply to the PRA. Indeed, the City notes that King County addressed the doctrine of separation of powers in its briefs to this Court in *Nast*, although the Court did not reach the issue.[15] As the body primarily responsible for the regulation of the judiciary and the lower courts, this Court should undertake the initial analysis of whether and to what extent the application of the PRA would actually interfere with the fundamental or inherent functions of this branch of Washington's government.

For all these reasons, this Court should grant direct review pursuant to RAP 4.2(a)(4).[16]

---

[14] A remand may be necessary because it is unclear whether or to what extent the City would (or will) argue that the City is excused from compliance with Koenig's requests by virtue of the doctrine of separation of powers. As suggested in Koenig's trial court motion, if this Court rejects the City's categorical reliance on Nast, the City should be given an opportunity to present an argument that the separation of powers limits the reach of the PRA with respect to one or more of Koenig's requests for records. Koenig's Cross-Motion at 15-16.

[15] *City's Response* at 6. The *Nast* court did not address the issue, perhaps because of the broad sweep of the County's argument that any application of the PRA to courts would be unconstitutional. *See* Appendix C. (Portions of the brief of appellant and respondent in *Nast* are attached as Appendices C and D.) Such a categorical approach would be inconsistent with this Court's more recent decisions that "The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread." *Carrick*, 125 Wn.2d at 135.

[16] In the trial court, Koenig explained that, if the Court rejects the City's argument under *Nast*, then the City has an obligation to identify the records that it has withheld. *Koenig's*

RESPECTFULLY SUBMITTED this 4th day of November, 2008.

By: _____
William John Crittenden, WSBA No. 22033

WILLIAM JOHN CRITTENDEN
Attorney at Law
927 N. Northlake Way, Suite 301
Seattle, Washington 98103
(206) 361-5972
wjcrittenden@comcast.net

Certificate of Service

I, the undersigned, certify that 4th day of November I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:
ramer@foster.com

and First Class Mail to:

Ramsey Ramerman
Foster Pepper PLLC
1111 3rd Ave Ste 3400
Seattle WA 98101-3264

_____
William John Crittenden, WSBA No. 22033

Reply at 5. The City has not argued otherwise. This issue will be addressed in greater detail in the Koenig's *Brief of Appellant*.

OFFICE RECEPTIONIST, CLERK

To: William John Crittenden
Cc: Ramsey Ramerman
Subject: RE: City of Federal Way v. Koenig, No. 82288-3

Rec. 11-4-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: William John Crittenden [mailto:wjcrittenden@comcast.net]
Sent: Tuesday, November 04, 2008 3:58 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ramsey Ramerman
Subject: City of Federal Way v. Koenig, No. 82288-3

Dear Clerk-

Enclosed please find appellant's Statement of Grounds for Direct Review in case number 82288-3. As instructed by the clerk (Lisa) this copy does not include the appendices to the Statement. A hard copy of the Statement with appendices will be mailed today.

Thank you.

William John Crittenden
Attorney at Law
927 North Northlake Way Ste. 301
Seattle, WA 98103
(206) 361-5972
wjcrittenden@comcast.net

OFFICE RECEPTIONIST, CLERK

From: William John Crittenden [wjcrittenden@comcast.net]
Sent: Tuesday, November 04, 2008 3:58 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ramsey Ramerman
Subject: City of Federal Way v. Koenig, No. 82288-3
Attachments: 2008 11 04 Statement of Grounds for Direct Review .pdf

Dear Clerk-

Enclosed please find appellant's Statement of Grounds for Direct Review in case number 82288-3. As instructed by the clerk (Lisa) this copy does not include the appendices to the Statement. A hard copy of the Statement with appendices will be mailed today.

Thank you.

William John Crittenden
Attorney at Law
927 North Northlake Way Ste. 301
Seattle, WA 98103
(206) 361-5972
wjcrittenden@comcast.net

IN THE SUPERIOR COURT OF KING COUNTY

IN AND FOR THE COUNTY OF KING

CITY OF FEDERAL WAY,)

Plaintiff,)

vs.) No. 08-2-21328-5 KNT

DAVID KOENIG,)

Defendant.)

ORIGINAL

VERBATIM REPORT OF PROCEEDINGS

BEFORE THE HONORABLE RICHARD McDERMOTT

JUDGE OF THE SUPERIOR COURT

September 19, 2008

Regional Justice Center

Kent, Washington

Ed Howard

Court Reporter

Appendix A

A P P E A R A N C E S

FOR THE PLAINTIFF: Ramsey Ramerman

FOR THE DEFENDANT: William Crittenden

* * * * *

ATTENTION READER: Please note that a computer disk in WORD PERFECT, AMICUS, or ASCII (formatted or unformatted), can be ordered from this court reporter and/or a complete, computerized word concordance of this transcript or a compressed copy of the transcript at a nominal fee. If interested, please call this court reporter at (206) 205-2594.

* * * * *

PROCEEDINGS

Unless specifically spelled out, names and places are spelled phonetically.

* * * * *

Appendix A

2:52P

THE COURT: Good afternoon, have a seat.

This is the matter of the city of Federal Way versus David Koenig, King County Cause No. 08-2-2-328-5, a Kent case.

We are here on cross motions basically for summary judgment and clarification. I have read over all of the pleadings, even some of the cases.

So, I'm ready to go. My plan would be that each of you get two shots at the apple because you both have cross motions. So it's appropriate it seems to me for both of you to go ahead and participate in that fashion.

So, I don't really care who starts.

I am assuming you are Mr. Crittenden?

MR. CRITTENDEN: I am Mr. Crittenden. This is my client, David Koenig.

THE COURT: I'm assuming you are Mr. Ramerman?

3:00P

MR. RAMERMAN: Yes, your Honor, and this is Pat Richardson, my client.

THE COURT: You are the representative from the city of Federal Way; is that correct?

MS. RICHARDSON: Yes.

THE COURT: All right. We have a court

Appendix A

reporter here; it's being reported. Regardless of my decision, it seems to me that the parties would be advised to seek review.

I have some thoughts about that, but I will share at the end with you.

I would like to hear the parties. I guess, Mr. Ramerman, yours was the first motion technically that I received. So, I will let you go first.

MR. RAMERMAN: Okay, thank you, your Honor.

THE COURT: Now, there is a podium here. People can use that, or you can sit instead of stand, if you prefer. I have no problem with that, because you have lots of things in front of you that you want to refer to, I am sure.

And Mr. Crittenden --

MR. CRITTENDEN: I prefer to do it from counsel table if that's okay.

THE COURT: That will be fine, sir.

MR. RAMERMAN: I will take you up on your offer. Thank you, your Honor.

THE COURT: You're welcome.

3:01P MR. RAMERMAN: This case before you presents the issue of whether court records are subject to the public records act.

Appendix A

We have in this case the benefit of three decisions, court of appeals and Supreme Court decisions that are directly on point, and in our position control this issue.

The Supreme Court in Nast addressed the issue of court records. There the Court framed the issue, specifically addressing whether courts and their court records are subject to the public records act. It specifically found, based in part on the definitions of the public records act, it did not include courts or court records in the definitions of agency and public records, that the case files in that case were not subject to the public records act.

Two subsequent court of appeals decisions addressed the broader issue of whether any court record, administrative record or the case files are subject to the public records act. Both of those cases concluded that these records are not subject to the public records act.

Public records request in this case is specifically for court records. The City has produced the records that the City had in this case. It has produced hundreds of pages of records, or at least over a hundred pages of records. But we are now talking about specifically the records that are in the

Appendix A

possession of the court, not in the possession of the City, and those records are not subject to the public records act under Nast, under Spokane & Eastern Lawyer, and under the Beuhler decision.

And we would ask the Court to follow those cases and conclude that these records are not subject to the public records act.

THE COURT: Do you think that the records that are being sought, Counsel, are records defined by the PRA?

MR. RAMERMAN: I think that you would have to look at that in two ways, and I would look at how the court in Nast looked at it. Under the plain meaning the court said in the definition of agency, The Nast court said, well, these records, this agency does seem to fit into the plain meaning, but we have to step back and look at the policies behind it. And based on those policies they decided the court is not, and the administrative agency that was at issue in that was not an agency.

I think if we look at the plain language of the public records in the writing, these records would appear to fit under that, but we have the guidance from Nast that tell us, and then from the subsequent two cases, that they are outside of the meaning of

Appendix A

public record.

:04P THE COURT: Outside the meaning of public records and not be subject to disclosure is what you are arguing?

MR. RAMERMAN: Correct, your Honor.

THE COURT: All right, thank you.

Mr. Crittenden?

MR. CRITTENDEN: Yes, your Honor.

Wayne Crittenden, representing Mr. Koenig.

First of all I want to remind the Court there are actually three types of records at issue, three specific sets of records.

One is correspondence; two are from a particular judge about a particular incident that was not correspondence relating to a pending case. We don't --

THE COURT: I think none of these are about a case.

MR. CRITTENDEN: That's true.

THE COURT: I think you should, for the record, I think you should put down exactly what the nature of these records are that you are requesting.

MR. CRITTENDEN: Well, your Honor, in fact that is in part the problem, and it is addressed by the relief requested in our motion and our proposed

Appendix A

order.

It is, under our analysis of the PRA, we need to know who has these records, because there is an argument to be made that a judge should not be bothered with responding to public record requests because judges have other things to do, and that might very well be in a position on the judge's independence as a branch of government.

And so the question becomes, is this correspondence, then, some court administrator has in a file somewhere? Or would this actually require an intrusion into the office of some judge? That from our viewpoint matters a great deal.

We tried to be as clear as we can, but the City has defined those documents that --

3:06P THE COURT: So you are saying the person who has possession of these records, the person who actually has possession of these records matters?

MR. CRITTENDEN: Yes.

THE COURT: The location of the records matters as to whether or not the PRA should be followed?

MR. CRITTENDEN: If you look at the analysis through the lens that has come up in subsequent cases that have dealt with the question of

Appendix A

how does legislation that purports to apply across the board to all State government, what happens when that collides head on with the judiciary?

And this comes up in those bar association cases in separation of powers. The answer isn't that simple. You have got to ask, can the judiciary be brought into and made to comply with this generally applicable scheme, or do we have a separation of powers problem here?

Since Nast they basically said we are not going to use the sledge hammer approach. We are not going to pretend that your employees are not part of the same employment law regime as the people who work over at the permit department are. They are; they are all city employees. Not yours, but the city of Federal Way.

3:07P THE COURT: I understand what you mean.

MR. CRITTENDEN: So the PRA does not ask the question, who is in possession of the records? That's not a part of the definition of public record, but it very well may matter when you have to do the separation of powers analysis.

Because if the only person who has a copy is a judge, you have a better argument that the PRA cannot be used to make a judge chambers produce a document as

opposed to a document that may be filed somewhere in an employee file down at the city clerk's office.

So, that's how that issue matters. And like I say, what we know about these records is that they were defined by the City as correspondence to or from Judge Beuhler -- not Judge Beuhler; I'm sorry -- Judge Morgan -- that isn't in the possession of another city employee.

Now, I'm assuming by that they mean that it is actually the judge has this. It's not really clear. The City won't give us a privilege log, which is normally required by PAWS, because of the argument that the PRA doesn't apply to the court system.

And this highlights one of the other problems of Nast, which is, the public records act not only determines what you can and cannot have as a requester, it also provides the structure, the legal remedies, the oversight, the in camera review that you use to talk about whether or not you can have records.

And the problem is highlighted by the fact that the City's own motion purports to be brought under the public records act, even though they claim it doesn't apply.

This is part of the problem with the overly broad interpretation of Nast, is that your whole structure

for reviewing this case goes out the window if you accept it at face value that the PRA doesn't apply to, quote, court records.

Now, there are two other kinds of records at issue. There are these exemptions from jury duty. And there is, we believe, some additional records relating to how the City goes about appointing pro-tem judges. The only records they produced in that third category were the official actions of the court or whatever to appoint these judges, that the correspondence, the applications, the decision-making process as to why these individuals were selected, were not produced. They don't say whether they have it or not. They are just hiding behind Nast.

So, and it's important to recognize that we are talking about theses different kinds of documents.

3:09P There are really three big issues with respect to Nast.

THE COURT: Let me get this right. And I read over the material, but I am asking you to put it on the record so it's very clear.

You want correspondence from and to Judge Morgan?

MR. CRITTENDEN: We want a log, first of all -- let me look at my order because I believe it was more narrowly.

The request was for a whole field of documents, and the definition of correspondence to or from Judge Morgan is the phrase that the City used to define the things it was withholding. That wasn't what my client requested. That was their definition of the substantive stuff not produced.

THE COURT: Okay.

MR. CRITTENDEN: Okay.

THE COURT: If for argument's sake we accept their definition, you want that?

MR. CRITTENDEN: Yes.

Or at least we want to know why it is exempt, and this is the reason why. Because under the PRA, you are entitled to know why you can't have something, and that's another problem with Nast.

3:10P THE COURT: You are assuming, of course, that it is not covered by the PRA, and then the argument that the City has is it was not covered; therefore, you are not entitled to know?

MR. CRITTENDEN: Exactly.

THE COURT: And you are not entitled to a log, either.

MR. CRITTENDEN: And you are not entitled to bring this action under Section 540.

THE COURT: Are you trying to argue

Appendix A

they can't have their cake and eat it, too?

MR. CRITTENDEN: Yes.

What I think is important to recognize is, Nast ruled on a specific issue, whether you could apply the PRA to superior court case files.

And the precise issue there was a policy that made it difficult to get the court case file, and the judge agreed with the requester.

And the Supreme Court said, no, court case files are governed by the common law; they are somehow part of the judiciary; we are not going to let the PRA apply to these records.

The analysis is quite frankly very sloppy and to a certain extent has been overtaken by subsequent events.

3:11P THE COURT: Well, but Division 2 and Division 3, both Judge Small and Judge Tompkin's cases, don't seem to overrule it because those two decisions seem to follow Nast. It seems to me that for argument's sake I would like to know how you can get around the Division 3 ruling.

MR. CRITTENDEN: Well, Division 3 ruling, that's the Beuhler v. Small?

THE COURT: No.

MR. CRITTENDEN: No, I'm sorry; that's

Spokane & Eastern --

THE COURT: Tompkins.

MR. CRITTENDEN: Is that not actually, I believe, Division 2?

MR. RAMERMAN: Spokane & Eastern Lawyer is actually Division 2.

THE COURT: Okay. Then move it to Division 2; I'm sorry.

It's the 2007 case, the most recent case.

MR. CRITTENDEN: Yes.

With respect to Judge Morgan, the stuff that the City is calling correspondence to and from Judge Morgan, Spokane & Eastern would appear to be on point, at least on that one class of records, because they are talking about judicial correspondence.

And, again, we said in our brief, you know, that case may be right for the wrong reasons.

THE COURT: But that case we are talking about correspondence from the court to the Spokane Bar Association.

3:12P MR. CRITTENDEN: Yes. And, therefore, it would have been governed on both ends of the correspondence by the separation of powers problem.

One, coming from the judge's chambers, and two, going to this regulatory body that belongs to the

Supreme Court.

THE COURT: That was kind of my feeling when I read the case.

MR. CRITTENDEN: And it was, Nast itself doesn't go that far.

THE COURT: No, but that case does.

MR. CRITTENDEN: Yes, that case does. And like I say, you may be stuck with that case insofar as ruling on Judge Morgan's correspondence, or what they are calling. But it doesn't actually address the question of these records.

THE COURT: You have two other areas that you want.

MR. CRITTENDEN: Yes.

The structure of the argument today is basically, there are three questions on the table.

One, is Nast law?

Two, is Nast precedent that you have to follow it with respect to one or more of these categories of these records that are at issue;

And, three, whether the trial court has to follow precedent.

Well, the City spent a lot of time on three. We know three. If you conclude Nast is precedence, obviously you have to follow it.

Appendix A

The other thing that is noteworthy is the City never actually bothers to defend Nast. Certainly it's not something we expected when this case started, that they would not defend this 22-year-old case, as being in fact correct and desirable.

It is going to put us in an odd position upon further review because there is not going to be any argument -- if you rule in their favor, there is not going to be anything in the record as to why Nast should be upheld.

So, it is kind of a strange response. But the second question is where the rubber meets the road. To what extent is Nast actually precedent as opposed to dicta, or as opposed to simply bad law on these particular types of records.

If you look at the actual reasoning in Nast, there are three of them. One is, the common law provides for access to court case files. Well, that doesn't extend to the jury exemptions, and it doesn't extend to the correspondence, because the common law, there is no argument that common law provides or governs access to these types of records.

So that leg of Nast doesn't do us any good.

The second part of Nast has been overtaken by subsequent legislation. Now, we got into an argument

Appendix A

about whether the Legislature overruled Nast. We didn't claim that it did, but it is absolutely clear that as part of this package of amendments that went through in 1987, the glitch that was identified in Nast, which is that there are these other statutes outside the codification of the PRA that limit access to records.

And the Court said, it looks to us like applying the PRA would wipe these things out. And the Legislature went back and, no, no, no, there are many other statutes that limit access also covering the PRA framework.

So the second leg of Nast is just not even in play anymore; it has been legislatively superseded. It hasn't been overruled, but that wasn't necessary.

3:15P And then the third leg of the analysis is the Nast's court approach to the definitions of agency and public record.

Now, court and court record are not defined in the PRA. The City's argument is based on the assertion that Nast determined that the PRA doesn't apply to courts and it doesn't apply to court records.

But these terms are not defined, either in the PRA or in Nast. They are just shorthand in a judicial opinion, and they don't have any meaning apart from

Appendix A

explaining how the court got to the precise holding that would not apply the PRA to court case files.

If Nast was absolutely unambiguously clear that the PRA doesn't apply to something that was called courts, and that we all knew what that meant, there would have been no reason for there even to be published opinions in either Buehler or Spokane & Eastern Lawyer because it would have been so obvious.

Well, why weren't the people who brought those cases just told, this is governed by settled law? Here is your unpublished opinion; get out of here. They would have gotten a one-page per curium probably written by a commissioner.

Apparently Nast is not that clear.

So, when you look at the holding in Nast, we are not going to apply the PRA to superior court case files. And you look at the three legal reasons it had for that holding, and recognize that they don't even extend to the documents at issue.

It's hard to say that Nast is actually precedent.

3:17P THE COURT: Tell me why they don't extend to the documents in issue? You have already talked about the correspondence.

MR. CRITTENDEN: Well, they don't extend because there is no common law on the access to

the jury waivers or the judicial correspondence. So leg one of Nast doesn't extend because there isn't any common law to be replaced.

Leg two of Nast, which is the lack of another statute exemption, does not work anymore because that was fixed in 1987.

And Leg three, the only part they can rely on, is how the Nast court broached the defined terms of agency and public record.

And they did not say that a court is not an agency. They did not hold that court records are not public records. They did, classic, you know, Bismarck would call it making sausage. They came up with this stuff that is, if you read it, you begin to realize that it's gobbledygook.

The last sentence in the paragraph where they talk about the King County Department of Judicial Administration -- this is where it crosses from Page 305 to 306.

It says, A reading of the entire public records section of the PDA -- and they are referring then to what was called the Public Disclosure Act -- indicates that they, meaning superior court case files, and the judiciary are not within the PDA.

Now, here in the actual paragraph in which Nast

Appendix A

starts to talk about what these definitions mean and where they go, it didn't say "courts". It says, "the judiciary and its case files."

So, this careless over statement of Nast that it says the agency and public records definition don't go to courts and court records, that's just sloppy paraphrasing. That's not what the court actually said.

And, furthermore --

THE COURT: Wouldn't you agree that that's how Division 2 and Division 3, however, have interpreted the court?

MR. CRITTENDEN: Yes, but to the extent they were ruling on anything other than the documents at issue, that's just dicta. They were both addressing the question, one, was the judge's notes.

And as we have said, it seems pretty obvious that there is going to be a common law or a separation of powers exemption on that stuff anyway.

So, concluding that, you know, they can look at this and say, it doesn't extend to the judiciary. Well, the record at issue in both those cases were actual correspondence from the judges themselves.

Okay. And, again, going back to my previous point, which is the separation of powers analysis, may

Appendix A

tip on who is being burdened by the obligation to respond. It may matter whether it's a letter that you wrote about some court employee and your dissatisfaction with that person that is now in an employee file somewhere, or if it's still in your computer or your e-mail box and you have to go get it in response to a public records request. This may matter.

But the point is that Nast doesn't actually go that far. It's not so clear that you can say, it held that the court is not an agency. It doesn't say that.

It does not say court records, anything in possession of the Federal Way Municipal Court is not a public record. It doesn't say that.

And all those other two cases do is extend its application to two different pieces of judicial correspondence.

And as I said, we may be bound by them with respect to Judge Morgan's correspondence, but there is no argument whatsoever about why Nast is binding on the other two records at issue in this case.

3:21P THE COURT: All right.

Mr. Ramerman, I want you to respond specifically to the second and third specific requests for information, exemption from jury duty and the records

Appendix A

in how the city goes about appointing pro-tem judges.

MR. RAMERMAN: Thank you, your Honor.

I think that we need to look at what the court said in Nast and how it reached its conclusion, and then we need to look at how the court in Beuhler and in Spokane & Eastern Lawyer reached their conclusion.

What Mr. Koenig is trying to say here is, Hey, there is some logic that we could have reached the same result some narrow way. So you should limit the court to this narrow logic. But that is not how the courts addressed the issue.

In Nast the court specifically looked at whether the judiciary and its case files are within the public disclosure act. It didn't say, looking at just whether it was case files. If its holding was meant to be limited to our case files subject to public records acts, as pointed out in the Spokane & Eastern Lawyer case, the court could just have decided it solely on the common law access issue, which would have resolved the issue of case files, and we would have been done.

But that's not what the Nast court did. It went on to specifically talk about the policies behind it, and specifically talking about the definitions of agency and court records. And, you know, we often

wish court opinions are written clearer than they are actually written, but the Nast court was very clear in talking about the definitions of agency and public record.

The court is saying they are not within those meanings, that the court records are not within the meaning of those definitions.

So the court in Nast based its decision on a broader issue. It's also important to remember in Nast that the agency where the public records request went to was not the court's. It was actually an agency, a specific agency.

So in trying to figure out what the Nast court was saying and how they decided to get where they wanted to go, they used a much broader logic than would have been necessary if all they wanted to do was limit access to case files.

So, then, when we turn to Spokane & Eastern lawyer, not surprisingly it looks like, especially in the Spokane & Eastern Lawyer case, that the request in that case made the same argument that Mr. Koenig is making here, which is that Nast just applied to court files.

And what Division 2 did is, it went through and used this exact logic that I am using now, which I got

Appendix A

from the opinion, which is, the Nast court used three bases for its opinion.

If it wanted to limit it to case files, it would have limited. It could have limited its analysis strictly to this common law access right. But instead the Supreme Court went broader, had a broader holding, and so we need to apply that broader holding.

We also need to look at what Spokane & Eastern Lawyer actual holding, which is that the Nast decision was meant to protect all court records, not court files. The Spokane & Eastern Lawyer case, there is nothing in that case that would say that this logic is limited to judicial correspondence.

They aren't looking at it in that fashion. That is the actual request that was at issue, but the holding of the case and the way they reached the analysis is broader than that. Once again, it is broader, and it encompasses all court records.

So, while it may be possible that the court could have reached narrower holdings, could have reached the same conclusions by basing it on their narrow legal analysis, the courts in Nast and Spokane & Eastern Lawyer applied a broader legal analysis that applies equally to all court records, not judicial correspondence. These are all records that are in

Appendix A

possession of the court; they are not city records.

And so that is why they, that's the broader analysis.

Now, Mr. Crittenden's attack on Nast, he makes three points, and he notes that I only responded to one of the three issues he raises in Nast. The reason why we don't respond to the other two issues is because those are the arguments the dissent made in Nast, the exact argument the dissent made in Nast that were obviously rejected by Nast.

So, we can't come to this Court and say, well, the majority rejected these reasonings and the dissent made them; so let's make them again.

I mean, that's not a way we get around the decision. So, specifically, if you look at the dissent, they specifically talk about, they criticize the majority's analysis of the common law access to records, and they criticize their use of the broad definition of public record, or not applying the broad definition to cover these records.

The only point that I think Mr. Crittenden made that was not rejected expressly by Nast is this idea that somehow the Legislature overruled Nast by a subsequent legislation.

And if you look at the opinion, the statute that

Appendix A

he references, that statute is unambiguous in its intent, one of those times when the Legislature was a hundred percent clear on what they were doing.

What they were doing was, they were not trying to overrule Nast. If they wanted to overrule Nast, if they read the Nast opinion and didn't like it, they should have been looking at the definition of agency and the definition of public record, because that is where the court in Nast specifically references that these are not within these definitions.

So, the Legislature knows how to overrule the statutes. That's why we cited in our case, I think a comparable analysis, which is the Friends of Snoqualmie Valley where there is a similar type argument.

And what the Supreme Court said in the Friends of Snoqualmie Valley is, a Supreme Court opinion, the accompanying statutes are binding on this court unless the Legislature is expressed about its intent to overrule prior judicial decisions.

And so here if they wanted to overrule Nast the Legislature would have made, and they could have done this really easy. All they had to do was say, courts are in the definition of agency. Court records are in the definition of a public record.

It wasn't a difficult thing to do, but instead they weren't looking at Nast. They weren't trying to overrule Nast. And so that's the third argument that they make on attacking Nast.

I think Nast is, he has not put out a good explanation for this Court to not follow Nast, and of course this Court needs to follow Nast.

And Nast is still good law. And Spokane & Eastern Lawyer and Buehler, when they are following Nast, and in a broader fact pattern properly applied that case. The holding in those cases, the reasoning in those cases, apply to all court records, not specifically to case files and are not limited to judicial correspondence.

Really what Mr. Crittenden says even in his brief, he wants this Court to look at it under a separation of powers lens. And if the Supreme Court thought this was a separation of powers case in Nast, they would have done it. It was briefed by King County, the separation of powers argument.

The Supreme Court did not limit or base its holding on a separation of powers analysis. So the idea that whether the court should be looking at how disruptive it would be if the court had responded to these public records requests simply is not how the

court decided to decide it.

They had a broader holding that applies. The logic of those reasons, even if we said it was dicta, dicta from the Supreme Court is, while even not necessarily binding, lower courts generally follow dicta from the Supreme Court.

3:29P THE COURT: Unless the dissent is dicta.

MR. RAMERMAN: Yes. But in this case, I would say it's not dicta because they based their decision on three separate grounds, and the logic applies to this case in all types of the court record.

THE COURT: Thank you, Counsel.

Mr. Crittenden, one more shot?

MR. CRITTENDEN: Yes.

First of all, the City now has tried to defend the three arguments in Nast, but it hasn't answered the question which is, how do these three rationales, presence of common law, definition of agency, and public record, or possible conflict between other statutes, how do any of these actually work in the City's favor with respect to the two records we are talking about?

They don't. They are defending Nast on the issue Nast decided, which is the superior court case files.

Appendix A

The actual question is, why would this rule go any further?

We are not arguing that the Legislature overruled Nast, and I will explain how this works.

Nast says that applying the PRA to the court case files would undo a whole set of statutory protections for certain kinds of court case records.

Is the City taking the position that that is still the case?

No.

You can make all the argument you want about what the legislative intent or the primary purpose of the 1987 legislation was, but the fact remains, that part of Nast is not correct.

The PRA now has an other statute exemption, and the statement on Page 307 of Nast that application of the PDA to court case files would undo all that has been developed. That is just not true.

I would love to hear an argument that the other statute exemption doesn't apply to Title 13. I don't think there is any argument on that one.

The final point is, the City is not drawing a good distinction between dicta and holding. Courts says all kinds of things, but they are not legislatures. They decide specific issues, and if the

Appendix A

issue is not the same, then it's not actually precedent.

They could say in a judicial opinion interpreting the PRA that the Republic of Georgia should be recognized as an independent country. They could say it very clearly. That doesn't make it the holding, and it doesn't make it precedent.

3:31P The Nast court was asked to decide whether or not the PRA was going to be applied to the superior court case files. That's as far as it goes. To go beyond that, to say, well, we are just going to take little bits of language, and we are going to tell you that it's what they said and it's what they meant, that's not precedent.

You may be persuaded by that part of the Nast opinion but you are obligated to follow it.

THE COURT: All right, Gentlemen.

After listening to argument, what I try and do in many these cases is, I try to read over the cases, read over the briefs before you come in so that I think I understand all the issues and I can intelligently listen to your arguments.

Then sometimes I like to go back and re-read a couple of the cases, and that's what I'm going to do here.

I have heard the argument; I read over your material. I already looked at the cases. I'm going to go back and look at the cases again, and I will have a decision for you next week.

And I will tell you right now when the decision will be so there won't be any surprises.

MR. CRITTENDEN: Is it possible to arrange to have the decision e-mailed?

THE COURT: Yes.

MR. CRITTENDEN: I will make sure that the clerk has my e-mail.

THE COURT: We can e-mail it or we can fax it. I am inclined to sign an order and have it faxed.

MR. CRITTENDEN: That's fine.

THE COURT: So, perhaps before you leave you could give our clerk the fax number that you would like me to do that to.

Let me look at my calendar for next week, and I can let you know when I will have the decision done.

MR. CRITTENDEN: Thank you, your Honor.

3:34P THE COURT: No later than 5:00 on Wednesday I will have it done for you.

So, if you would, I would very much appreciate it. I would appreciate it if you would make sure that

Appendix A

you give the fax phone number to the clerk before you leave, both of you.

I also want to tell you that regardless of how I rule, and I do have some proposed orders in here. If you have original proposed orders that you would like to leave with the clerk, that would be fine, too.

Regardless of how I rule, it seems to me that this is a case that in view of related issues that have come about over the course of the last several years that the State Supreme Court ought to take a look at, regardless.

Because, No. 1, I will interpret what the cases say, and I will try and follow what those cases say. One of your arguments, Mr. Crittenden, is that, well, one of the arguments at least in the written material was, the State Supreme Court got it wrong and things have changed in the courts over the last 20 years that would mandate a different result were the current court deciding the same fact pattern. I think that is what you wrote.

3:36P MR. CRITTENDEN: That is our position, yes.

THE COURT: That's what you put forth.

I am not inclined to, I haven't made up my mind how I am going to rule, but if I rule against you, I

Appendix A

would really strongly encourage you to take that up.

MR. CRITTENDEN: I think we are planning to do that, your Honor.

THE COURT: And what I am also encouraging you to do is, if you lose, both of you, take it up, but bypass the court of appeals and go right to the State Supreme Court because you are just going to be wasting your time at the court of appeals. Not that they won't give you a reasoned, good decision, but ultimately the State Supreme Court has to resolve this issue regardless of how I rule.

So, I would be willing to assist you in seeing that the matter is transferred directly to the State Supreme Court.

MR. CRITTENDEN: Thank you, your Honor.

MR. RAMERMAN: Thank you.

THE COURT: All right.

Counsel, I have enjoyed this. This is an interesting issue. You both have written well. You both have argued well. You have both argued extremely well. So, regardless of how I rule, I want you to both know I thank you for letting me work on this case, and I do think that I will be interested to know what happens regardless of what my ruling is.

But you will have a ruling before next Wednesday

at 5:00. I will be out of the courthouse most of the day Monday; otherwise, it would be a little earlier than that, quite frankly. I want to take some time to read the cases over, think about them and then write up my order, all right?

So, please leave an original copy of the order and your fax number with the clerk. Court is at recess.

Good luck to both of you; thank you very much for being here.

3:38P (Evening Recess)

Appendix A

C E R T I F I C A T E

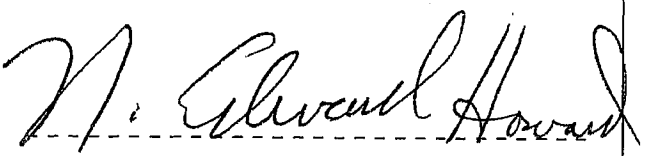
STATE OF WASHINGTON)
) ss.
COUNTY OF)

I, N. Edward Howard, official court reporter for the State of Washington in and for the county of King, do hereby certify that I was acting in that official capacity on September 19, 2008, during the proceedings in the matter of CITY OF FEDERAL WAY v. DAVID KOENIG, Cause No. 08-2-21328-5 KNT.

I further certify that the foregoing transcript, consisting of 35 pages, is a true and accurate transcript, and that these proceedings were reported by me in machine/computer stenotype and thereafter reduced to print by me or under my direction.

I further certify that I am not related to any of the parties to this action, nor am I interested in the outcome thereof.

WITNESS MY HAND on this 10th day of October, 2008, in the City of Kent, County of King, State of Washington.



N. EDWARD HOWARD
OFFICIAL COURT REPORTER
REGIONAL JUSTICE CENTER
ROOM 2D
KENT, WASHINGTON 98104

Appendix A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF FEDERAL WAY, a Washington Municipal Corporation

Petitioner,

v.

DAVID KOENIG, a Washington State resident,

Respondents.

The Honorable Richard F. McDermott

No. 08-2-21328-5KNT

ORDER DECLARING PUBLIC RECORDS ACT DOES NOT APPLY TO FEDERAL WAY MUNICIPAL COURT

~~(Proposed)~~

Clerk's Action Required

THIS MATTER came on for hearing on Petitioner City of Federal Way's "Motion Regarding Non-Disclosure of Court Records" and Respondent's "Response and Cross-Motion for Partial Summary Judgment." The Court has considered the following documents in connection with Petitioner's Motion:

1. The pleadings and papers previously filed in this case;
2. City of Federal Way's Motion Regarding Non-Disclosure of Court Records;
3. Declaration of Patricia Richardson and exhibits attached thereto;
4. Koenig's "Response and Cross-Motion for Partial Summary Judgment;
5. Declaration of David Koenig and exhibits attached thereto
6. City of Federal Way's Response to Counterclaims and Reply;

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

ORIGINAL

Appendix B

7. Reply on cross-motion from Koenig, ~~if any,~~ and

8. Other materials and briefing:

AND All existing case Authority

Having reviewed the materials submitted by the parties, having heard argument from the parties, and the Court being fully informed,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

The City of Federal Way's motion is GRANTED and Koenig's motion is DENIED. The City of Federal Way Municipal Court is not subject to the Public Records Act. Presiding Judge Michael Morgan's correspondence are court records, not subject to the Public Records Act. The City was not required to produce an exemption log of court records that are not subject to the Public Records Act. Accordingly, a PERMANENT INJUNCTION IS ISSUED providing that the City of Federal Way does not need to provide the requested correspondence in response to Respondent Koenig's public records request. Koenig's cross-claims are DISMISSED WITH PREJUDICE.

DATED this 24th day of September, 2008.

Richard F. McDermott

The Honorable Richard F. McDermott
Superior Court Judge

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 • 206-447-4400

Appendix B

Presented by:
PATRICIA RICHARDSON
FEDERAL WAY CITY ATTORNEY and

FOSTER PEPPER PLLC

Ramsey Ramerman, WSBA No. 30423
Attorneys for the City of Federal Way

Agreed as to form;
Notice of Presentation waived:

WILLIAM JOHN CRITTENDEN, Attorney at Law

William John Crittenden, WSBA No. 22033
Attorneys for David Koenig

Appendix B

NO. 51741-0

SUPREME COURT OF THE STATE OF WASHINGTON

THOMAS B. NAST,

Respondent,

v.

M. JANICE MICHELS, King County Superior Court Clerk; RANDY REVELLE, King County Executive; KING COUNTY, a county organized under the State of Washington; and the KING COUNTY DEPARTMENT OF JUDICIAL ADMINISTRATION,

Appellants.

BRIEF OF APPELLANTS

NORM MALENG
King County Prosecuting Attorney

FRED KASEBURG
Deputy Prosecuting Attorney
Attorneys for Appellants

E550 King County Courthouse
Seattle, Washington 98104
Telephone: 583-4437
gfciv34

Appendix C

the PDA refer to "courts" in a context clearly indicative that they are not within the meaning of "agencies". For example, RCW 42.17.340 reads in pertinent part as follows:

> (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific record or classes of records. . . .
>
> * * *
>
> (3) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorneys fees, incurred in connection with such legal action. . . . (Emphasis added)

Obviously, the people used the word "courts" exclusive of the meaning of "agency". "Agency" could not include superior courts if the superior courts are to review the actions of agencies. Interpretation of "agency" to include courts would lead to absurd consequences. Courts are also referred to in a manner to indicate they are different than "agencies" in RCW 42.17.310 and .330, and perhaps other sections of the Act.

d. Including Courts Would Make PDA Unconstitutional.

To interpret this Act to include "courts" within the "agency" definition would render it unconstitutional. Many cases speak of the courts' separate and inherent power over their own records and files. See Nixon v. Warner Communications, 435 U.S. 589, 598, 55 L. Ed. 2d 570, 98 S. Ct.

1306 (1978). In Washington, that power is not only inherent, but also statutory. The power and duties of the court clerk include keeping the records and files of court proceedings, RCW 2.32.050. The power of the court includes control over its ministerial officers. RCW 2.28.010(5). Another power of the court, both statutory and inherent, is its power "to adopt procedural rules necessary to the operation of the court." Emwright v. King County, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). See also RCW 2.04.200.

> Since the promulgation of rules of procedures is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature.

State v. Smith, 84 Wn.2d 498, 502, 527 P.2d 674 (1974). All laws in conflict with the rules of court shall have no force or effect. RCW 2.04.200.

The separation of powers doctrine precludes encroachment upon the power of the judiciary to control its own procedures and its own records. If it had been intended in the constitution to leave the control of judicial power in the legislature, it would have been useless to distribute the judicial power to a separate branch of government. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174, 2 L. Ed. 60 (1803). "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution

Appendix C

is written." Marbury, supra, at 176. The Washington Supreme Court has further defined the separation:

> The legislative, executive, and judicial functions have been carefully separated and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts.

Hagan v. Kassler Escrow, Inc., 96 Wn.2d 443, 453, 635 P.2d 730 (1981) (citation omitted). See also In re Juvenile Director, 87 Wn.2d 232, 552 P.2d 163 (1976).

To the extent that the statute needs interpretation, the rules of statutory construction presume constitutionality and dictate that statutes be interpreted in a manner that will render them constitutional. RCW 42.17.020(1) cannot be interpreted constitutionally unless the agencies subject to the Act are exclusive of the judicial branch of government.

e. Federal Courts Are Not Covered By FOIA.

The state PDA closely parallels the federal Freedom of Information Act, and judicial interpretations of the FOIA have been construed to be particularly helpful in interpreting the PDA. Hearst Corporation v. Hoppe, 90 Wn.2d 123, 580 P.2d 246

Appendix C

NO. 51741-0

SUPREME COURT OF THE STATE OF WASHINGTON

THOMAS B. NAST,

Respondent,

v.

M. JANICE MICHELS, et al.,

Appellants.

BRIEF OF RESPONDENT

Stephen K. Strong
Fred Diamondstone
Thomas B. Nast

Attorneys for Respondent

Stephen K. Strong
Bendich, Stobaugh & Strong
2111 Smith Tower
Seattle, WA 98104
(206) 622-3536

Thomas B. Nast
Fred Diamondstone
416 Pioneer Bldg.
Seattle, WA 98104
(206) 223-0670

Appendix D

Guild, supra, 92 Wn.2d at 851.[10]

The Legislature has recognized the general applicability of the PDA to judicial records by specifically providing that certain judicial records shall be exempt from release under the Act, including records of Judicial Qualifications Commission proceedings (RCW 2.64.110), and statewide Special Inquiry Judge petitions (RCW 10.29.030).

The PDA thus has no exemption for the courts and the legislature has recognized the Act's coverage of judicial records by specifically exempting some of them from disclosure under the Act. The County next argues that application of the PDA to the courts would be unconstitutional.

3. Application of the Public Disclosure Act to the courts would not violate the separation of powers.

The County asserts that the PDA cannot apply to the courts because the legislature cannot encroach on the courts' control over their records. Br. 19-21. This point is not an issue in this case, since the Superior Court did not order challenged restrictions. Even if the court had ordered these restrictions, the PDA would apply since the courts recognize the Legislature's right to regulate access to Court records.

The Washington Supreme Court expressly held that a legislative enactment on access to juvenile court files superseded a differing judicial rule on access. Seattle Times v. Benton County, 99 Wn.2d 251, 263, 661 P.2d 964 (1983). See also Cohen v. Everett City Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975)(constitutional right of access to court

---

[10] The County states that the PDA parallels the federal FOIA and there are "no FOIA cases...holding that the federal act applies to court records and documents." Br. 21-22. However, Hearst Corp. v. Hoppe, supra, 90 Wn.2d at 129, noted that "the state act is more severe than the federal act in many areas." This is indeed the case with respect to the definition of "agency". In the federal FOIA, Congress and the courts are specifically excluded (5 U.S.C. §551(1)):

> For the purpose of this subchapter--
>
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--
>
> (A) the Congress;
>
> (B) the courts of the United States;...

The absence of a similar exclusion from the state act shows an intent that the state law is to be interpreted differently.

proceedings and records may have "statutory exceptions").11

Both legislative enactments and court rules reflect an awareness of legislative authority to regulate access to court records. The Legislature has adopted a number of statutes governing access to various judicial records, including deferred prosecution records (RCW 10.05.120), juvenile court files (RCW 13.50.050), artificial insemination records (RCW 26.26.050(3)), paternity action files (RCW 26.26.200), adoption records (RCW 26.33.330), and mental commitment files (RCW 71.05.390).

The judiciary has also explicitly recognized legislative action concerning records access in its rulemaking, e.g., Juvenile Court Rules 10.1 and 10.3 et seq.; Model Local Rules for District and Municipal Courts, Rules 79(A), (B) and (C) (in Washington Court Rules 1986, pp. 880-81 (West Pub. Co. 1985)); Judicial Information System Committee Rules 11 and 12.

Historically the legislative branch of govern-

11 The County incorrectly states (Br. 22) that "federal courts have always resolved questions of access to federal court records on the basis of common law," not statutes, citing Nixon v. Warner Comm., 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed. 570 (1976). In fact Nixon proves the contrary, since it held the Presidential Recordings Act "obviates exercise of the common-law right" of access to certain court records. 435 U.S. at 607 n.18.

ment has regulated access to court records by statute and these regulations have been followed by the courts, e.g., Seattle Times v. Benton County, supra, 99 Wn.2d at 262. The County's argument that the Legislature did not and could not regulate access to court documents in the PDA is neither supported by the statute's language nor court decisions. Therefore, even if the Clerk's office were in the judicial branch of County government and the actions challenged were ordered by the courts, the PDA's requirements would apply, because the court's records are not exempt in general from the Act.

D. The Clerk's Next-Day-Access Rule Violated the Act's Requirement of "Prompt" Disclosure in the "Most Timely Possible Action."

The PDA requires that public records be made "promptly available" to requesters during normal office hours, with the "most timely possible action." RCW 42.17.270, .280 and .290. The trial court found after trial (CP 60) that the Clerk's next-day-access rule, with its various exceptions, (1) was burdensome, inefficient and costly, (2) did not provide for records "to be promptly obtained on request," and (3) caused a "substantial reduction"

Appendix D